

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF DELAWARE
J. CALEB BOGGS FEDERAL BUILDING
844 NORTH KING STREET
WILMINGTON, DE 19801
TELEPHONE: 302-573-6170

	:	Jury Trial Demanded
JAMES M. IRVIN, M.D.,		
Plaintiff, <i>pro se</i>	:	Civil Action
	:	No.
V.	:	Filed: 08 - 1 8 3
James B. Peake, Secretary,		
Department of Veterans Affairs,	:	
Defendant.	:	
	:	

COMPLAINT

PARTIES

1. Plaintiff, James M. Irvin, M.D. ("Dr. Irvin"), is a citizen of the United States and a resident of the Town of Wilmington, County of New Castle, States of Delaware.
2. Defendant, James B. Peake, Secretary for the Department of Veterans Affairs ("VA" or "agency"), is head of this federal administrative agency within the executive branch of the United States Government.

JURISDICTION

3. This Court has jurisdiction over this matter pursuant to
 - (a) 5 U.S.C. §552 and §552a, in that this action is the nature of the *Freedom of Information Act (FOIA) claim* and a *Privacy Act claim* to compel an officer or an employee of the FBP to produce records which had been requested by plaintiff in pursuant to *FOIA/Privacy Act*;
 - (b) 28 U.S.C. §1331, in that this action arises under the Constitution, laws, or treaties of the United States; and
 - (c) 5. U.S.C. §§701-706, in that this action is brought by a person suffering legal wrongs because of agency

action or adversely affected or aggrieved by agency action within the meaning of a relevant substantive statute.

VENUE

4. The United States District Court for the District of Delaware is the appropriate venue for this action pursuant to 5 U.S.C. §552(a)(4)(B), 5 U.S.C. §552a(g)(5) and 28 U.S.C. §1391(e)(2), in that Dr. Irvin resides in this judicial district.
5. On February 8, 2008, Plaintiff, Dr. Irvin, served upon the VA a *Freedom of Information Act (FOIA)* and *Privacy Act* request (**Exhibit A**), seeking the following described documents relating to his Appraisal, the methodology of the agency's evaluation process, the procedural irregularities, and the factual basis and support for the overall proficiency rating "low satisfactory" conclusions reached by Dr. Murphy. The documents requested under the FOIA/Privacy Act are described below.
 - a. All notes created or maintained by, or in the possession of his supervisors, Dr. John Murphy, Director of Primary Care and Dr. Michael Grippi, Chief of Medicine, relating in any way to
 - (aa) any of Dr. Murphy's counseling of plaintiff concerning his performance, attendance or conduct at any time within the 12 month period preceding this request.
 - (bb) plaintiff's performance at any level below the "satisfactory" level in any rating category during the October 1, 2006 through September 30, 2007 evaluation period.

(cc) plaintiff's progress reviews between October 1, 2006 through September 30, 2007.

b. all documents (as that term is described above) reflecting and/or containing the alleged comments made by Dr. Murphy and Dr. Grippi to plaintiff during any of plaintiff's progress reviews between October 1, 2006 through September 30, 2007.

c. all documents (as that term is described above) reflecting and/or containing the alleged comments or responses made by plaintiff to Dr. Murphy and Dr. Grippi during any of plaintiff's progress reviews between October 1, 2006 through September 30, 2007.

d. all documents (as that term is described above) reflecting, corroborating or supporting the allegations set forth in Dr. Murphy's and Dr. Grippi's *Performance Appraisal Narrative* concerning plaintiff (FY 07 Rating Period), that:

- (aa) "During the past year he (Dr. Irvin) has failed to meet the quality standard in performing these (C&P) exams as designated by the Compensation and Pension Exam Program (CPEP). [The performance standard is a CPEP score of $\geq 90\%$ on at least 90% of exams reviewed]";
- (bb) "He (Dr. Irvin) is the only member of the C&P team who consistently has not met the performance target for these measures";
- (cc) "In addition, he (Dr. Irvin) has failed to participate fully in the performance improvement activities which have helped other examiners achieve successful records on exam quality";
- (dd) "He (Dr. Irvin) has consistently stated that he (Dr. Irvin) does not think that the CPEP quality program is important, and feels that he does an adequate job addressing all the exam elements that are required by the VA Regional Office";
- (ee) "He (Dr. Irvin) has refused to participate with the Quality Management nurse who reviews the exams of all C&P examiners";
- (ff) "He (Dr. Irvin) has also refused to adopt a systematic method of dictating C&P exam reports using the CPEP criteria as a guide. Because of this, he (Dr. Irvin) frequently forgets to address certain required elements on exams, particularly on reports that

include more than one exam type. All of the other examiners have adopted a systematic method and have found it very helpful in achieving 100% scores on the overwhelming majority of their exams";

- (gg) "He (Dr. Irvin) used to care for a limited number of primary care patients. During this past year, I [Dr. Murphy] had to remove him from this duty";
- (hh) "He (Dr. Irvin) was removed from this duty because of 1) consistently poor performance on performance measures (clinical reminder actions), 2) his (Dr. Irvin's) unwillingness to see patients in the primary care area where he (Dr. Irvin) and they (patients) would benefit from nursing services, and 3) his (Dr. Irvin's) unwillingness to make efforts to schedule his primary care patients during his designated primary care sessions, resulting in frequent interruptions during his scheduled C&P exams";
- (ii) "During the past 3 years, he (Dr. Irvin) has received complaints from several C&P patients about the quality and professional nature of his exams";
- (jj) "In general, the patients complain that he (Dr. Irvin) does not listen to them well, and doesn't perform much of an examination, even regarding body parts relevant to the C&P exam type requested";
- (kk) "I [Dr. Murphy] have discussed these complaints with him and advised him (Dr. Irvin) that he 1) is scheduled adequate time to listen to each patient's complaints in detail, and 2) should definitely perform appropriate examination of those organ systems or body parts relevant to the claim at hand."

e. all documents (as that term is described above) reflecting and/or containing the alleged comments made by Dr. Murphy and Dr. Grippi to plaintiff concerning any of the alleged performance deficiencies set forth in paragraph 4 above.

f. all documents (as that term is described above) reflecting and/or containing the alleged comments or responses made by plaintiff to Dr. Grippi and Dr. Murphy concerning any of the alleged performance deficiencies set forth in paragraph 5 above.

g. all documents from the Patient Advocate's office including the complete list of all the patients of all the providers in the C&P section and in primary care that have complained and the written documents from the patients who filed a complaint (and not the subjective interpretation of the

patients' complaints) for the last three years.

On February 8, 2008, plaintiff requested from Mr. Gerald Morelli, Chief of Human Resources that all the information and documents identified above be sent to him.

On February 8, 2008, plaintiff notified Mr. Morelli that plaintiff will shortly initiate precomplaint counseling, pursuant to 29 CFR .1614.105(a), because of plaintiff's belief that the adverse 2007 Proficiency Report was motivated by discrimination based on reprisal for prior EEO activity, in violation of Title 38 employees.

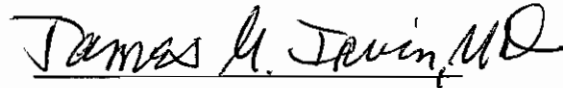
On February 8, 2008, asked Mr. Morelli to advise him when the requested documents will be supplied and if the plaintiff may be permitted to submit a supplement to this reconsideration request (after receipt of the requested documents).

6. It should be noted that plaintiff, Dr. Irvin, has not received these documents from the VA concerning his *FOIA/Privacy Act* request. More than 21 days have passed and the agency has ignored this request.
7. The statutory period in which the VA was required to respond to the *FOIA/Privacy Act* request has passed.
8. To date, the VA has not supplied documents responsive to Dr. Irvin's *FOIA/Privacy Act* request.
9. Dr. Irvin has exhausted his administrative remedies, pursuant to 5 U.S.C. §552(a)(6)(C)(i).
10. Defendant's refusal to disclose the requested documents is wrongful, capricious, arbitrary and without lawful reason or excuse, and Dr. Irvin is entitled to relief provided by the *FOIA/Privacy Act*.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court enter an order:

- A. Directing the Defendant, the VA, to release to the plaintiff a copy of all documents identified by this complaint.
- B. Awarding plaintiff costs and attorney fees; and
- C. Granting other and further relief which the court may deem proper.



James M. Irvin, M.D., *pro se*
Plaintiff

Plaintiff's Home Address:

1100 Lovering Avenue, Apt. 500
Wilmington, DE 19860
Telephone number: (302)778-1323.

April 2, 2008

Exhibit A

Memorandum

Department of Veterans Affairs

Date: February 8, 2008

From: James M. Irvin, M.D., Staff Physician
Compensation & Pension Section
Department of Veterans Affairs Medical Center
3900 Woodland Ave
Philadelphia, PA 19104

To: Martin Heyworth, M.D., Chief of Staff
Department of Veterans Affairs Medical Center
3900 Woodland Ave
Philadelphia, PA 19104

Re: Reconsideration Request Of My Annual Proficiency Report For The
FY 07 Rating Period Of October 1, 2006 To September 30, 2007

Dear Dr. Heyworth:

On January 25, 2008, I was issued my annual proficiency report ("Proficiency Report") for the FY 07 rating period of October 1, 2006 to September 30, 2007. John Murphy, M.D., Director of Primary Care and Michael Grippi, M. D., Chief of Medicine Service, respectively, were the rating and reviewing officials.

This letter constitutes the initiation of a request for reconsideration, under the *VA Handbook 5013, Part II, VA Directive 5013*. This reconsideration request is directed to you, as a higher level management official not directly involved in the rating. I am alleging that I received an unfair, a procedurally defective and a discriminatory performance evaluation in my Proficiency Report for the period October 1, 2006 to September 30, 2007 (based on reprisal for prior EEO activity).

Dr. Murphy's narrative comments purportedly supporting "I have been performing in a low satisfactory manner in my position as a staff physician in the Compensation and Pension (C&P) section," are in part, self-serving, vague, generalized and inaccurate, and fail to take into account significant and material evidence and factors bearing upon the validity of the evaluation.

Prior to my receipt of the Proficiency Report on January 25, 2008, I had not received any prior warning in the 90 days previous, as is mandated by Medical Center Memorandum No. 05-35 – "Proficiency Rating System," April 2002, despite Dr. Murphy's disingenuous representations to the contrary. The official rating document, entitled *Employee Annual Proficiency Report* (Automated VA Form 10-2623a), is not completed and signed by Dr. Grippi (second level supervisor) as is required by this Medical Center Memorandum. I categorically deny that I received any counseling during the 90 days prior to the September 30, 2007 rating period. I deem Dr. Murphy's and Dr. Grippi's misrepresentations in the Proficiency Report (undated and unsigned by Dr. Grippi) to be part of their discriminatory efforts (on the basis of reprisal for prior EEO activity) to rate my overall

performance at the "low satisfactory" level.

I ask for an opportunity to make a written supplement to this reconsideration request. I also request that I have an opportunity to secure certain documents requested below - in order to analyze them and assess the accuracy and *bona fides* of Dr. Murphy's critical comments supporting the alleged performance deficiencies. It is *unreasonable* to require me to present a fully comprehensive rebuttal without according me the opportunity to review all documents relevant to the performance issue. Fairness and justice demand nothing less. There can be no harm or prejudice, were the agency to supply the requested documents to me.

I am making a formal request for these documents under the Freedom of Information Act, as amended, 5 U.S.C. 552, in conjunction with the Privacy Act, 5 U.S.C. 552a.

If this request has been misdirected, I request that you inform me immediately in writing and either apprise me of the proper individual to whom this request should be made, or, in the alternative, direct this Freedom of Information Act/Privacy Act request to the appropriate official. If any part of my request is denied, please list the specific exemptions which are being claimed to withhold information. If you determine that some portions of the requested material are exempt, please provide me with the remaining non-exempt portions in accordance with the Act. I reserve my right to appeal any decision to withhold information and request that you inform me of the address and office where such an appeal can be sent.

Please number the items furnished to correspond with my request. If any of the requested information does not exist, please so state.

I agree to pay all reasonable costs for locating the requested information and reproducing it. However, in the interests of justice, I request that you waive all fees in connection with this request. If this request is processed under the Privacy Act, I expect, as the Act provides, that no fees will be charged for locating requested files. If the fee waiver is not granted and fees will exceed \$50.00, I request permission to review the records which are responsive to this request and select those which I want copied. In the event a delay is encountered with regard to any portion of the requested information, I request that the remaining portions be sent to me without delay.

For the purposes of this **Freedom of Information Act/Privacy Act** request, the term "document", or "documents" means any written, electronic, computer stored, recorded, filmed, or graphic matter, whether produced, reproduced or on paper, cards, tapes, films, electronic facsimile, computer storage devices or any other media, including, but not limited to, memoranda, notes, emails, minutes, records, photographs, correspondence, faxes, diaries, reports, studies, charts, graphs, statements, notebooks, handwritten notes, appointment calendars, notes, records and recordings of oral conversations, work papers, and also including, but not limited to, originals and all copies which are different in any way from the original whether by interlineation, receipt stamp, notation, indication of copies sent or received, or otherwise, and drafts which are in the possession, custody or control of your present or former agents, representatives, or attorneys or any and all persons acting on their behalf, including documents at any time in the possession, custody or control of such individuals or entities known by you to exist.

This FOIA/Privacy Act request concerns information and documents relating to my Appraisal, the methodology of the agency's evaluation process, the procedural irregularities, and the factual basis and support for the overall proficiency rating "low satisfactory" conclusions reached by Dr. Murphy. The documents requested under the FOIA/Privacy Act are described below.

1. All notes created or maintained by, or in the possession of Dr. Murphy and Dr. Grippi relating in any way to

- (a) any of Dr. Murphy's counseling of me concerning my performance, attendance or conduct at any time within the 12 month period preceding this request.
- (b) my performance at any level below the "satisfactory" level in any rating category during the October 1, 2006 through September 30, 2007 evaluation period.
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2. all documents (as that term is described above) reflecting and/or containing the alleged comments made by Dr. Murphy and Dr. Grippi to me during any of my progress reviews between October 1, 2006 through September 30, 2007.

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- (b) "He is the only member of the C&P team who consistently has not met the performance target for these measures";
- (c) "In addition, he has failed to participate fully in the performance improvement activities which have helped other examiners achieve successful records on exam quality";
- (d) "He has consistently stated that he does not think that the CPEP quality program is important, and feels that he does an adequate job addressing all the exam elements that are required by the VA Regional Office";
- (e) "He has refused to participate with the Quality Management nurse who reviews the exams of all C&P examiners";
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Please send me all the information and documents identified above. Please be advised that I will shortly initiate precomplaint counseling, pursuant to 29 CFR 1614.105(a), because of my belief that the adverse 2007 Proficiency Report was motivated by discrimination based on reprisal for prior EEO activity, in violation of Title 38 employees.

Please advise me when the requested documents will be supplied and if I may be permitted to submit a supplement to this reconsideration request (after receipt of the requested documents).

Sincerely,

James M. Irvin, M.D.

cc: Richard Citron, Medical Center Director
Gerald Morelli, Chief of Human Resources
John Murphy, M.D., Director of Primary Care
Michael Grippi, M.D., Chief of Medical Service

James M. Irvin, M.D., Staff Physician
Compensation & Pension Section
Department of Veterans Affairs Medical Center
3900 Woodland Ave
Philadelphia, PA 19104

April 2, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Re: James M. Irvin, M.D., v. James B. Peake, *Secretary*
Department of Veterans Affairs
U.S. District Court For The District of Delaware
Civil No.

Dear Attorney General:

Enclosed please find a true and correct copy of the Summons and Complaint in the above matter. This letter with enclosure is being sent by certified mail and a return receipt requested.

Sincerely,

James M. Irvin, M.D.

Enclosures

James M. Irvin, M.D., Staff Physician
Compensation & Pension Section
Department of Veterans Affairs Medical Center
3900 Woodland Ave
Philadelphia, PA 19104

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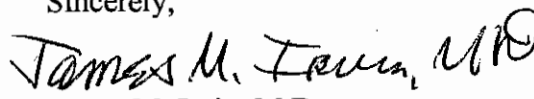
Assistant General Counsel
Department of Veterans Affairs
Office of General Counsel, Professional Staff Group 6
810 Vermont Avenue, N.W., Room 1030
Washington, D.C. 20420
Telephone: (202) 273-6660
Fax: (202) 273-6671

Re: James M. Irvin, M.D., v. James B. Peake, *Secretary*
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Dear Counsel,

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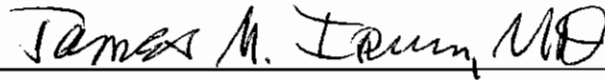
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James B. Peake, Secretary,		
Department of Veterans Affairs,	:	
Defendant.	:	
	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing complaint and the summons was served upon the following by regular first class mail, this date, to:

Assistant General Counsel
Department of Veterans Affairs
Office of General Counsel, Professional Staff Group 6
810 Vermont Avenue, N.W., Room 1030
Washington, D.C. 20420



James M. Irvin, M.D., *pro se*
Plaintiff

Dated: April 2, 2008

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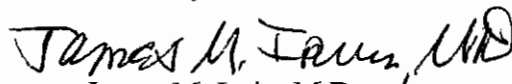
Assistant United States Attorney
Office of the United States Attorney
Nemours Building, P.O. Box 2046
Wilmington, DE 19899-2046
Telephone: (302) 573-6277
Fax: (302) 573-6220

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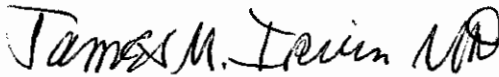
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Assistant United States Attorney
Office of the United States Attorney
Nemours Building, P.O. Box 2046
Wilmington, DE 19899-2046
Telephone: (302) 573-6277
Fax: (302) 573-6220


James M. Irvin, M.D., *pro se*
Plaintiff

Dated: April 2, 2008

James M. Irvin, M.D., Staff Physician
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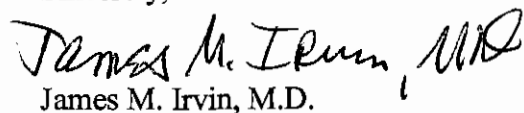
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James M. Irvin, MD

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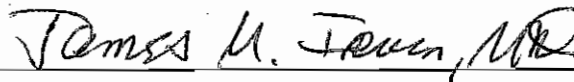
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